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December 1, 1995

BY HAND

Sandra Danner, Chief  
Legal Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
Room 7130  
Washington, D.C. 20554

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Dear Ms. Danner:

Enclosed are ten (10) copies of the revised Comments of Western Wireless Corporation, filed on November 30, 1995 in response to the Notice of Proposed Rulemaking, Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT docket No. 95-157, RM-8643, released October 13, 1995. The revised document contains a correction to a clerical error in footnote 2 on page 2; otherwise, no changes have been made. Please substitute the enclosed copies of the corrected comments for those that were submitted on November 30, 1995.

Thank you for your assistance, and please call me if you have any questions or need anything further.

Sincerely,

  
Doane F. Kiechel

Enclosures

cc: Linda Kinney, Esquire  
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the matter of )  
 )  
Amendment to the Commission's ) WT Docket No. 95-157  
Rules Regarding a Plan for ) RM-8643  
Sharing the Costs of Microwave )  
Relocation )  
 ) NOV 30 1995  
To: The Commission

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COMMENTS

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November 30, 1995

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## SUMMARY

Western Wireless Corporation ("Western"), whose subsidiaries are licensed to provide PCS service in six MTA's, supports the Commission's efforts to adopt final rules regarding a cost-sharing plan for microwave relocation that encourages a reasonable negotiation process, results in a fair distribution of costs among present and future PCS providers and leads to expedited deployment of PCS systems.

While Western generally supports the PCIA consensus plan for cost-sharing, it does take issue with certain aspects of the plan as proposed by the Commission. Specifically, Western urges the Commission to adopt a "good faith" requirement for the voluntary negotiation period, so that microwave incumbents are not permitted to refuse to negotiate at all or make excessive demands, thus stalling PCS construction and service to the public. Failure to impose a continuing good faith negotiating requirement is totally at odds with the well established principle that good faith and fair dealing always bear upon the public interest, and that no less should be expected of Commission licensees.

Western also asks that Commission clarify numerous other issues relating to the cost-sharing formula, reimbursable costs, the cost-sharing cap, the set of obligees under the cost-sharing formula, specifics regarding operation of the clearinghouse and the definition of comparable facilities.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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| Rules Regarding a Plan for     | ) |                      |
| Sharing the Costs of Microwave | ) |                      |
| Relocation                     | ) |                      |

To: The Commission

**COMMENTS**

Western Wireless Corporation ("Western"), by its attorneys, hereby respectfully submits its Comments in response to the Notice of Proposed Rulemaking, FCC 95-426 ("NPRM") in the above-referenced proceeding, released by the Commission on October 13, 1995.

**I. INTRODUCTORY STATEMENT**

1. Western currently provides cellular radiotelephone service in more than 75 markets west of the Mississippi River. As part of its effort to provide seamless coverage in the western United States and to bring to the public new service offerings, Western successfully participated in the FCC's broadband A/B block PCS auction. Two wholly-owned subsidiaries, Western PCS I Corporation ("WPCI") and Western PCS II Corporation ("WPCII"), were awarded a total of six A block licenses.<sup>1/</sup> Western is also participating as a non-controlling investor in an applicant in the

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<sup>1/</sup> WPCI holds licenses in the following MTAs: KNLF259 in Portland (Market No. 30A, File No. 00056-CW-L-95), KNLF263 in Des Moines-Quad Cities (Market No. 32A, File No. 00060-CW-L-95), and KNLF281 in Oklahoma City (Market No. 41A, File No. 00078-CW-L-95). WPCII holds licenses in the following MTAs: KNLF271 in Salt Lake City (Market No. 36A, File No. 00068-CW-L-95), KNLF277 in El Paso-Albuquerque (Market No. 39A, File No. 00074-CW-L-95), and KNLF293 in Honolulu (Market No. 47A, File No. 00090-CW-L-95).

Commission's upcoming C block auction.<sup>2/</sup> Thus, Western has a strong interest in the outcome of this proceeding, and in urging the Commission to expedite action, so that PCS may reach its full potential at the earliest possible date.

2. Western fully supports a plan that requires PCS licensees that benefit from the relocation of a microwave link to contribute to the costs of that relocation. Subject to the specific comments below (which are set forth in the order of the applicable paragraphs in the NPRM), Western generally supports the PCIA consensus plan. However, Western has serious concern because the PCIA consensus plan, as currently configured, includes a two year voluntary negotiation period (three years for public safety carriers), during which microwave incumbents have no obligation to negotiate with PCS licensees in good faith or even to negotiate at all. Simply put, each PCS licensee is wholly at the mercy of a potentially intractable microwave incumbent. In Western's own experience, service from at least one of its systems may be delayed for months or even a year or more because of the refusal of one incumbent to agree to a simple relocation of a single 2 GHz link. This situation demands immediate attention.

## II. COMMENTS

### A. Formula

3. The cost-sharing formula includes a  $T_1$  variable which has been defined as "the month that the first PCS licensee obtained

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<sup>2/</sup> Cook Inlet Western Wireless PV/SS PCS, L.P., accepted for filing in Public Notice, Report No. AUC-95-05, Auction No. 5, November 20, 1995.

rights to reimbursement (as denoted by the numerical abbreviation for each month, i.e., March = 3)." NPRM at ¶ 25. The Commission asked for comment on whether T<sub>1</sub> should be based on a uniform fixed date. Western supports a uniform T<sub>1</sub> date of April 5, 1995. Having hundreds of T<sub>1</sub> dates is overly complicated and ultimately confusing. For consistency in the commencement of the voluntary period, this date should be April 5, 1995.

4. The Commission asked for comment on whether a PCS licensee should receive 100 percent reimbursement (up to the cap) for relocating a link that is outside of its licensed frequency block. NPRM at ¶ 34. Western supports the concept of full reimbursement for a licensee who relocates a link wholly outside of its band, even if that link is within the relocater's MTA. Accordingly, Western also advocates that the two upper right hand boxes in the chart under ¶ 34 (i.e., both or one endpoint inside relocater's MTA/BTA and outside of relocater's block) should be changed from "pro rata reimbursement" to "100 percent reimbursement." There are considerable practical difficulties in determining how much interference is received by an adjacent channel link, and hence calculating the pro rata share an adjacent interferor should pay. Simplicity in application is Western's preference. A possible alternative would be to require a PCS licensee relocating an adjacent link to pay a fixed percentage of the cost of the move, both as a price of being first and as a means of protecting the interests of future cost-sharing licensees. Unfortunately, that approach would discriminate against the

licensee who must move a number of non-interfering links as the price paid for the privilege of moving links that do interfere; would unfairly benefit the provider coming in shortly behind the relocating entity; and ultimately would become a disincentive to relocating links on a timely basis. Thus, Western believes that PCS providers should bear the full cost (up to the cap) of relocating Bulletin 10-F interfering co-channel links within their geographic MTA/BTA boundaries, regardless of when -- or by whom -- the link is actually moved.

5. Western agrees with the Commission's tentative conclusion that all qualified relocation expenses incurred after April 5, 1995 should be reimbursable. NPRM at ¶ 35. A relocater's access to cost-sharing should not be adversely affected by the date the rules are actually put in place. To do so not only would penalize those licensees who are anxious to begin construction, but also would unfairly and arbitrarily benefit those who wait to construct and operate their PCS systems or those who participate in later BTA auctions. A depreciation formula beginning on April 5, 1995 would adequately charge the relocater for any benefit received.

B. Premium Versus Non-Premium Costs

6. The Commission has tentatively concluded that premium payments should not be reimbursable, because such payments "are likely to be paid by PCS licensees to accelerate relocation so that they can be the first licensee in the market area to offer PCS services." NPRM at ¶ 37. If legitimate system-oriented relocation expenses fall under the cap, Western does not support the concept



of dividing them further into reimbursable "non-premium" costs and nonreimbursable "premium" costs. To use a typical example, would the construction of a digital microwave system to replace an old analog system denote a "premium," even if the digital system is roughly twice the cost of analog? Replacement of analog for analog is by definition a "comparable" system. However, the incumbent may never accept an analog system, and the digital upgrade may be the only means of effecting any relocation during the voluntary period. What is clear is that because of the "good faith" requirement, rooted in the concept of comparable facilities, it will be easier to hold down costs during the mandatory negotiation period. Unfortunately, for most providers, two or three years is simply too long to wait. Accordingly, every deal for clearing a link during the voluntary period should not be subject to heightened scrutiny because of the real world pressures to provide a premium system. It would be more equitable to have two standards for what denotes a premium -- a more relaxed one during the voluntary period that (accurately) recognizes the difficulty of negotiating at this early stage, and a stricter standard during the mandatory period. A good way to implement such an approach would be to rely on caps that are in place and allow reimbursement up to the caps for all specified reimbursable costs during the voluntary relocation period -- even if that means that a few "premium" deals are reimbursed. Any qualified expenses less than the cap should be reimbursable, while those above the cap should not be.

C. Sunset Provisions

7. Western supports the Commission's tentative conclusion that the cost-sharing plan should sunset ten years after the date that voluntary negotiations commenced for A and B block licensees. NPRM at ¶ 39. Five years would not give adequate consideration to the eventual need to relocate additional links that affect only the most remote, last-built territories in a market. Should the Commission adopt Western's request that April 5, 1995 be the T<sub>1</sub> date in all cases, then the reimbursement obligation sunset would correspond exactly with the ten year depreciation schedule.

D. Reimbursement Cap

8. Western fully supports the Commission's tentative conclusions with regard to the value of a cap. NPRM at ¶ 42. The cap serves the appropriate purpose of protecting the rights of future licensees, but would have no effect on the terms of the relocation deal itself. A realistic cap is not detrimental to the incumbents. A higher cap could be detrimental to the PCS licensees, because it would raise the expectations of incumbents. System comparability -- not the cap amount -- should be the primary focus of all relocation discussions.

9. The \$250,000 cap suggested by PCIA and supported by the Commission should be adequate to cover the vast majority of all relocations and should not be increased. NPRM at ¶ 43. Western has experienced costs of relocation that are very similar to those stated in the study conducted by the FCC's Office of Engineering and Technology, i.e., \$132,000 to \$215,000 per hop, assuming a new

tower does not have to be built. Raising the cap to cover a few exceptions would only serve to distort the process in the vast majority of cases.

E. Reimbursement Versus Interference Rights

10. The Commission has proposed that on the date that a relocation agreement between a PCS licensee and a microwave incumbent is submitted to the clearinghouse, the PCS licensee becomes the holder of the reimbursement rights, which are separate from the underlying license. NPRM at ¶ 46-47. As long as appropriate means of enforcement of cost-sharing obligations are assured, Western advocates the simplest possible approach in the reimbursement vs. interference rights issue. Given the stated administrative advantages of creating new "reimbursement rights," versus the difficulties in preserving "interference rights" (or transferring the entire license to the PCS licensee), the reimbursement rights approach seems preferable. Western's primary concern is that regardless of what mechanism is used, it must be effective in terms of administrative workability and enforcement. To the extent reimbursement rights accomplish these aims, Western supports that approach.

F. Actual Versus Theoretical Interference

11. The Commission has tentatively concluded that TIA Bulletin 10-F is an appropriate standard to determine interference for purposes of the cost-sharing plan. NPRM at ¶ 52. Western generally supports the use of Bulletin 10-F, but strongly disagrees with the Commission's tentative conclusion to limit the application

of Bulletin 10-F for reimbursement purposes to the minimum coordination distance equations. Cost-sharing obligations should fall to the co-channel licensee within the MTA/BTA who will actually interfere with the link in question, as determined by an application of Bulletin 10-F. Bulletin 10-F should not be limited in its application simply to the determination of coordination distance, as proposed by the Commission. Even more importantly, reimbursement should not be required everywhere within such coordination distance as a means of simplifying the process. That conclusion cuts against the grain of the rest of the NPRM. Such a plan would totally defeat the fundamental concept of moving only interfering links. Bulletin 10-F coordination distances are, in reality, extremely poor predictors of actual interference in many cases. Adopting Bulletin 10-F coordination distances as the sole cost-sharing test would create vast confusion from multiple overlaps in congested markets (growing even worse with the BTAs), and would force licensees to make drastic and irrational system design changes (e.g., lower antenna height, lower EIRP) for the sole purpose of reducing their coordination distance and thus avoiding additional cost-sharing obligations. Simple as it may sound in theory, such a rule would be disastrous in practice.

G. Adjacent Channel Interference

12. The Commission has tentatively concluded that reimbursement should be required only in the case of co-channel (but not adjacent-channel) interference. NPRM at ¶ 55. Western does not believe that adjacent-channel interference can be measured

well enough to allocate the costs among all "benefited" parties, and, furthermore, believes that any attempt to do so will prove extremely time consuming and contentious. Most licensees will ultimately bear equal costs under either scheme (co-channel only, or both co-channel and adjacent-channel). No matter how finely costs of relocating a number of links are distributed, relocation costs will ultimately distribute themselves across all licensees in proportion to their respective MHz and pop ownership. Thus, an adjacent-channel scheme is not only unworkable but also, in the final analysis, unnecessary.

#### H. Date of Reimbursement Payment

13. Western disagrees with the Commission's tentative conclusions that the obligation to make the cost-sharing payment should arise at the time the PCS licensee initiates service that would have interfered with the relocated link. NPRM at ¶¶ 57-58. Western believes that the date of initiation of service may be difficult to verify and monitor. Hence, Western advocates that the date payment is due, and the  $T_2$  date in the depreciation formula, should be set at 10 days after the clearinghouse notifies the PCS licensee that a payment obligation exists.

#### I. Clearinghouse Issues

14. The Commission has proposed funding the industry clearinghouse by requiring PCS licensees that seek reimbursement under the cost-sharing plan to pay an administrative fee to the clearinghouse for each relocated link that is potentially compensable under the plan. NPRM at ¶ 64. Western disagrees. The

clearinghouse should be funded pro rata based on the number of owned MHz-pops (PCS only), and the numerator and denominator of the formula should increase as each new round of licenses is granted. Clearinghouse operating costs would thus be spread broadly over the widest relevant group at all times, properly burdening the holders of the first and largest licenses (i.e., the MTAs) and providing a lighter burden for the last and smallest auction winners. To burden only those licensees who have reimbursable links -- especially for each reimbursable link submitted -- is to claim that they are the only benefited parties, and is to deny that the benefit of relocation also applies generally to future licensees.

15. In response to concerns expressed about confidentiality of clearinghouse information, Western believes that it should be quite manageable for the clearinghouse to administer strict confidentiality rules. NPRM at ¶ 65. Preservation of confidentiality should not be a major concern.

16. The Commission has tentatively concluded that disputes arising out of the cost-sharing plan should initially be brought to the clearinghouse for resolution. NPRM at ¶ 67. Western generally supports such an approach, but stresses that the clearinghouse, at a minimum, must have the ability to influence the assignment/transfer of control and license renewal process for PCS licenses in order to enforce payment. The clearinghouse must be able to enforce what will occasionally be expensive, unpopular decisions.

J. The Good Faith Requirement

17. The Commission has proposed a definition of good faith that is satisfied by the PCS licensee's offer to replace a microwave incumbent's system with comparable facilities; however, this concept would apply only during the mandatory negotiation period. NPRM at ¶ 69. While Western supports this definition, it also believes that a requirement of good faith during the voluntary period, with an explicit penalty attached for failure to bargain in good faith, is the only effective means of enforcing a posture of good faith over the next year and a half, when most relocations will have to occur. "Good faith and fair dealing bear upon the public interest,"<sup>2/</sup> and it is wholly inconsistent with the historic notion of licensee responsibility for the Commission to adopt a regime which not only sanctions a lack of good faith by licensees, but rewards it. Clarifying what "good faith" means after the voluntary period is over is important but wholly insufficient. Requiring all parties to negotiate in good faith when it really matters -- during the voluntary period -- is what is required.

18. Incumbents, if so motivated, know that if they refuse to act in good faith during the voluntary period, they will gain a tremendous -- and tremendously unfair -- bargaining advantage over the PCS licensee who cannot economically wait until the voluntary period is over. Extortionate deals involving moving of entire systems and upgrading from analog to digital, all at the expense of the PCS licensee (and ultimately the licensee's subscribers), are

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<sup>2/</sup> Granik v. FCC, 234 F.2d 682, 684 (D.C. Cir. 1956).

the inevitable results. The length and terms of the voluntary period are the essence of the problem the PCS community faces with regard to relocation. Adding a requirement of good faith in the voluntary period or shortening the voluntary period to one year would be the most effective action FCC could undertake.<sup>1/</sup> Certain incumbents would quickly abandon their intractable attitudes if they were required to negotiate in good faith during the voluntary period and were subject to meaningful penalties if they did not so negotiate. In addition to altering the rules to require good faith during the voluntary period, Western would also advocate that even stronger rules attach to the mandatory period, i.e., demotion to secondary license status upon failure to reach agreement before the end of the mandatory period.

19. To recount one real world experience in one of its markets, Western has reached an impasse with the final incumbent pertaining to a critical portion of its service area. Western has been unable to frequency plan around this incumbent. With numerous base stations leased and under construction, roaming agreements signed, a switch in place, and many other long-term commitments on its books, it is simply one incumbent's refusal to negotiate that

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<sup>1/</sup> A one year voluntary period was proposed by Congress in the Budget Act, and then removed. Staff of House Comm. on Commerce, Science and Transportation, 104th Cong., 1st Sess., Proposed Reconciliation Recommendations, Hall Amendment to Spectrum Auction Legislation, (Comm. Print Sept. 13, 1995). However, Western stresses that such action (or imposing a good faith obligation during the voluntary period, or both) is essential to enable PCS licensees to have any ability to turn up their systems in those cases where intractable incumbents view the whole process as their opportunity to gain a windfall, either in the form of free system upgrades or found money.



will prevent Western from providing PCS service. Moreover, construction will continue to be stalled until that one incumbent agrees to negotiate. The incumbent has hinted that it would like every PCS licensee affecting any of its multi-MTA microwave network to agree, as a group, to provide a full system switchout (all analog to all digital) before it is willing to move even one link. The relocation of the entire system will take years. Ironically, it is only one link that is a problem for Western. Relocating that link from 2 GHz analog to 6 GHz analog (which is, in fact, a comparable relocation under the rules) could be accomplished in a matter of weeks. This one link is a tiny percentage of the incumbent's microwave system, but it is their primary leverage over Western. To paraphrase a conversation Western had with this incumbent's system manager, "[I] am willing to wait until the end of the mandatory period and be hauled into arbitration if that is what it takes. We want a new microwave system out of this. If you turn up in the meantime, I will shut you down." Western has the equipment on order to move that link, has the frequencies coordinated, and the manpower set aside. But Western is powerless until the incumbent agrees to talk in good faith.

20. The Commission has proposed a means to determine "comparability of facilities". NPRM at ¶ 74. With regard to comparability, Western requests that the Commission limit the bandwidth and capacity of any new microwave link to no more than the incumbent can verify using over the past twelve months. Building a wide-band 672-channel digital system, for example, to

the same level of reliability as the analog system currently using 50 channels that the PCS licensee is being asked to replace not only wastes money, but also wastes the limited and diminishing number of paths in other frequencies (such as 6 GHz) that could otherwise be licensed for more productive purposes. Western also expects that considerable unnecessary tower work will have to be done (to accommodate high performance and space diversity antennas) because incumbents are allowed to overstate their channel requirements. To give PCS licensees the power to determine the true needs of incumbents now would be to initiate the best audit of private operational bandwidth utilization the FCC could undertake.

K. Issues of Comparability

21. The Commission comments on the possible efficiencies and cost-effectiveness of relocating entire microwave systems. NPRM at ¶ 76. However, piecemeal relocation is usually appropriate unless the incumbent is being moved from analog to digital. When remaining analog (or replacing a digital link with another digital link), it is Western's experience that link-by-link relocation is both sensible and cost effective. Accordingly, Western does not support a blanket encouragement of more than specific link replacement, because to do so is simply to encourage overreaching. In addition, Western agrees with the Commission's proposal that third party consultant/attorney's fees should not be included in a definition of "comparable." Too often, third parties are brought in with the explicit aim of maximizing the incumbents' leverage

over the PCS licensees. It would be inequitable to require PCS licensees to pay for someone to negotiate against themselves.

22. The Commission has asked whether "if analog equipment is unavailable to replace an existing system, should the PCS licensee be permitted to compensate the microwave incumbent only for the depreciated value of the old equipment." NPRM at ¶ 77. Western believes that limiting the replacement obligation to depreciated value is to condemn many negotiations to delay or failure. First of all, it will not be simple to determine depreciated value. Secondly, it is likely to be close to zero, and will certainly not be sufficient to replace the necessary hops with anything but used equipment of dubious integrity. Asking the incumbents to pay a portion of the cost is usually to ask them to sacrifice elsewhere in limited budgets. One of the few levers PCS licensees have with incumbents is that the communications groups in these entities have been operating under shrinking budgets for many years, have endured numerous cutbacks, and actually are happy to find someone else to pay for new equipment. In this environment, the depreciated value solution is a poor one.

23. The Commission has asked whether the negotiating parties should be required to submit cost estimates during the voluntary negotiation period. NPRM at ¶ 78. The requirement that both parties submit a cost estimate within a short amount of time may well prevent bad faith negotiation. Again, however, without any enforcement provisions during the voluntary period, the requirement to submit estimates would be an exercise in frustration, in view of

the fact that there is no obligation to negotiate in good faith -- and thus no point in determining whether there has been an offer of comparable facilities -- during the voluntary period.

24. Western supports the Commission's tentative conclusion to give PCS licensees the right to request verification of the highly advantaged public safety status. NPRM at ¶ 80. The power to challenge their beneficial license status could prevent dishonesty.

25. Western agrees with the Commission that the surrender of microwave licenses should not necessarily prejudice an incumbent's rights under the relocation rules. NPRM at ¶ 85. However, it should be clarified that (i) Section 94.59(e) (which gives the incumbent the right to test its new facilities for one year to verify that they are comparable) only applies in the event of an involuntary relocation or an offer made during the mandatory negotiation period that the incumbent is required to accept because it is found to include "comparable facilities") and (ii) to the extent the rule applies in the case of any voluntary agreement, the incumbent may agree to waive its one-year comparability rights in a relocation agreement.

26. Western believes that forcing secondary status upon incumbents after a period of time is a logical extension of the decision to reallocate the PCS frequencies, NPRM at ¶ 90, but does not agree with the ten year period in all cases. Western believes that the period should be shortened in those cases where agreement cannot be reached by the end of the mandatory period. There need to be more incentives to promote the Commission's original intent

of effectuating smooth conversions. The most effective would be the threat of secondary status, whether upon the demonstration of bad faith negotiation any time during the relocation period, or the failure to achieve an agreement by the end of the mandatory period.

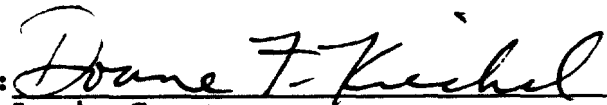
### III. CONCLUSION

Western urges the Commission to adopt the cost-sharing rules proposed in the NPRM, with the changes and additions described above. The PCIA consensus plan, so modified, will encourage early deployment of PCS systems and discourage microwave incumbents from impeding PCS service to the public and realizing unfair windfalls from their relocation.

Respectfully submitted,

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